

David F. Holmes, attorney at law, entered into an agreement with the claimant, Edward Skinner, III, to represent claimant in a workers compensation claim against respondent, the State of Kansas, on March 28, 2000. For reasons not explained in the record, claimant terminated his employment agreement with Mr. Holmes and entered into an employment agreement with Scott J. Mann, attorney at law, on January 23, 2001, to represent claimant in his workers compensation claim against respondent.

On June 22, 2001, Special Administrative Law Judge (SALJ) Stanley R. Juhnke, approved the settlement of claimant's workers compensation claim against respondent for a lump sum amount of \$6,900. At the settlement hearing, respondent provided claimant's attorney Scott J. Mann with two checks, one made out to David F. Holmes, attorney at law, for \$1,079.95 and the other made out to claimant for \$5,825.05.¹ The \$1,079.95 check made out to Mr. Holmes represented the amount of attorney fees claimed by Mr. Holmes for services he performed at \$100 per hour, plus expenses Mr. Holmes incurred while representing claimant from March 28, 2000 through February 8, 2001. Mr. Holmes had forwarded his statement for services and expenses to the respondent at the time claimant terminated his employment agreement with Mr. Holmes.

At the settlement hearing, the SALJ approved the contingency employment agreement between claimant and Mr. Mann. At the time of the hearing, Mr. Holmes had not filed his employment agreement with the Division of Workers Compensation. Additionally, at the settlement hearing, Mr. Mann explained to the SALJ that the two checks submitted by the respondent paid the settlement award in full and he would take care of satisfying Mr. Holmes' attorney fee lien.

But a dispute between Mr. Holmes and Mr. Mann arose as to the division of the attorney fees. As a result of this dispute, Mr. Mann, on July 12, 2001, filed a Motion for Division of Attorney Fees before ALJ Bruce E. Moore. On August 2, 2001, the ALJ heard Mr. Mann's motion. In an August 7, 2001, Order, that is one of the orders that are the subject of this appeal, the ALJ awarded Mr. Mann attorney fees in the amount of \$1,236.16 and Mr. Holmes attorney fees in the amount of \$618.08 for a total attorney fee amount of \$1,854.24. The \$1,854.24 total attorney fee represents 25 percent of the \$6,900 settlement amount plus \$129.24 that Mr. Holmes received in attorney fees for obtaining temporary total disability compensation for claimant before Mr. Holmes' termination.

In another Order dated August 8, 2001, the ALJ ordered Mr. Mann and Mr. Holmes to each pay 50 percent of the costs of the court reporter fee for the August 2, 2001, hearing on Mr. Mann's Motion for Division of Attorney Fees.

Mr. Holmes appeals both Orders. In regard to the August 7, 2001, Order, for the division of attorney fees, Mr. Holmes contends the ALJ should have awarded him \$950.71 in attorney fees instead of the \$618.08 awarded. Mr. Holmes contends the \$950.71 in attorney fees compensates him for the time for services he performed at \$100 per hour and expenses incurred minus \$129.24 in fees he collected before claimant terminated his employment for the temporary total disability compensation paid claimant.

Mr. Holmes argues his employment contract with the claimant specifically provides that if he is terminated then the claimant will pay Mr. Holmes for all the time he spent representing claimant up to the time of his termination at \$100 per hour plus expenses

¹ These two checks actually totaled \$6,905 instead of the total amount of the settlement of \$6,900.

incurred. Further, Mr. Holmes argues the SALJ, at the June 22, 2001, Settlement Hearing, approved Mr. Holmes' attorney fee lien when Mr. Mann accepted the check from respondent made out to Mr. Holmes in the amount \$1,079.95. Mr. Holmes also argues that the ALJ erred when he ordered Mr. Holmes to pay 50 percent of the costs of the court reporter fee charged for the division of attorney fees proceedings.

In contrast, Mr. Mann requests the Appeals Board (Board) to affirm both the ALJ's August 7, 2001, Order and his August 8, 2001, Order. Mr. Mann argues that the ALJ divided the maximum 25 percent contingency fee received from claimant's settlement award under quantum meruit and as the result of this division both attorneys received the reasonable value for the services they performed in representing the claimant in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering Mr. Holmes' brief, and hearing Mr. Holmes' and Mr. Mann's arguments, the Board makes the following findings and conclusions:

The Board finds that both the ALJ's August 7, 2001, and August 8, 2001, Orders entered in this case should be affirmed. Both of the ALJ's Orders set out findings of fact and conclusions of law that are accurate and supported by the record and the law. It is not necessary for the Board to repeat those findings and conclusions in this Order. Thus, the Board adopts those findings and conclusions as its own as if specifically set forth herein.

In particular, the workers compensation act (Act) provides that disputes regarding the division of attorney fees where, as here, the claimant has been represented by more than one attorney shall be heard and determined by the ALJ.² The Act also requires the ALJ to review each written contract of employment entered between the attorney and the employee and only approve the agreement and fees if both are in accordance with K.S.A. 44-536.³ No claim of any attorney for services rendered in connection with the securing of compensation for an employee shall exceed a reasonable amount for said services or 25 percent of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred.⁴

An attorney who is discharged before the occurrence of the contingency provided for in a contingency fee contract may not, generally, recover compensation based on the contingency, but the attorney may recover, in quantum meruit, the reasonable value of the services rendered.⁵ Here, the ALJ divided the maximum contingency fee of 25 percent based on a percentage of the number of hours each attorney spent in litigating claimant's

² K.S.A. 44-536(h).

³ K.S.A. 44-536(b).

⁴ K.S.A. 44-536(a).

⁵ Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, Syl. ¶ 1, 663 P.2d 663 (1983).

case. The Board agrees that utilizing this procedure based on quantum meruit resulted in each attorney receiving reasonable value for each of their services rendered.

The Board also agrees with the ALJ's conclusion that the clause in Mr. Holmes' employment agreement that required the claimant to pay Mr. Holmes \$100 per hour for all services performed up to the date of termination plus expenses incurred, at least, in this case, is not reasonable and is unenforceable. If this clause was enforceable, an attorney representing a claimant in a workers compensation case, depending on the number of hours of services rendered, could receive attorney fees in a greater amount before the contingency occurred than if the attorney had not been terminated and had represented the client through the time of the contingency. This would violate subsection (a) of K.S.A. 44-536 that provides that no claim for services rendered in connection with the securing of compensation shall exceed a reasonable amount or 25 percent of the amount recovered and paid, whichever is less.

The Board also finds the apportionment of the costs of the division of attorney fees hearing to 50 percent to Mr. Holmes and 50 percent to Mr. Mann is fair and reasonable. Thus, the Board affirms the ALJ's apportionment of the costs contained in the ALJ's August 8, 2001, Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's August 7, 2001, and August 8, 2001, Orders should be, and are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant, claimant's counsel Mr. Mann and respondent asked the Special Administrative Law Judge (SALJ) to approve a compromise settlement and enter an Order for the redemption of the award based upon a lump sum payment of \$6,900. See K.S.A. 44-531. At the Settlement Hearing, respondent presented claimant with two checks. Copies of those checks are not in evidence, but one was reportedly made payable to Mr. Skinner in the amount of \$5,825.05, and the other made payable to Mr. Holmes in the amount of \$1,079.95. At the Settlement Hearing before the SALJ, counsel for claimant stated:

Your honor, this is Scott Mann. Mr. Friedeman was kind enough to forward two checks from the State of Kansas. Together they total \$6,900.00 They are State Draft Number 0093651, in the sum of \$1,079.95, and State Draft Number 0093650, in the sum of \$5,825.05. These amounts together add up to the \$6900 in payment of the full award and in satisfaction of a previous lien filed by David Holmes, which counsel for the Claimant will take care of.

Whereupon, the SALJ approved the contract of employment between claimant and claimant's counsel. There was no other discussion concerning the amount of attorney fees or the apportionment of those fees between Mr. Mann and Mr. Holmes.

At the time of the Settlement Hearing there was no agreement between Mr. Mann and Mr. Holmes concerning the apportionment of attorney fees. At that time, Mr. Holmes had not filed his contract of employment. The contract of employment between claimant and Mr. Mann was introduced at the Settlement Hearing together with a Statement Regarding Attorney Fees wherein Mr. Mann certified:

I claim attorney's fees in this claim in the total amount of \$1,725.00, which is 25% of the amount of compensation to be recovered and paid on behalf of the employee or the employee's dependents. In addition, claimant agrees to reimburse his attorney the amount of \$535.76 for expenses incurred in this matter.

Under the unusual circumstances of this case, I would find claimant and Mr. Mann are estopped from denying that the check made payable to Mr. Holmes in the amount of \$1,079.95, belongs to Mr. Holmes. Mr. Mann stated to the court that he would "take care of" Mr. Holmes' lien. The settlement and the contract of employment between claimant and claimant's counsel were approved on that basis.

In addition, while I agree with the majority and Administrative Law Judge Moore that equity would also require that the reporter's fees for the hearing before Judge Moore on attorney fees should be paid by the attorneys, such an order is not within the jurisdiction of the Administrative Law Judge nor the Board. K.S.A. 44-555, the workers compensation statute governing the assessment of the reporter's fees, only grants discretion in assessing the reporter's fees among the parties. Under the statute claimant, his employer, and the

employer's insurance carrier, if any, are the parties in the litigation. The attorneys may be the persons with the direct interest in this issue of attorney's fees, but they are not parties to the litigation. Accordingly, the attorneys cannot be assessed the reporter's costs.

BOARD MEMBER

c: David F. Holmes, formerly Attorney for Claimant
Scott J. Mann, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director